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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 486

JOSEPH P. DUNNING, ERNEST BINGHAM, O. Q. GAINES, JOHN H. SIEVERS ET AL., INDIVIDUALLY AND AS AGENTS AND REPRESENTATIVES TO MAINTAIN THIS ACTION FOR AND ON BEHALF OF ALL EMPLOYEES SIMILARLY SITUATED,
Petitioners,

vs.

THE Q. O. ORDNANCE CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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INDEX

Opinions Below 1
Jurisdiction 2
Statutes Involved 2
Question Presented 2
Statement 3
Reasons for Granting the Writ 7

Argument—

Introduction 9

I. This Decision Conflicts with the Ruling Decisions on the Subject from the Ninth Circuit, the Sixth Circuit, the Fourth Circuit and Decisions of District Courts Located in the Third Circuit and the First Circuit. In Addition Thereto, It Conflicts with the Heretofore Settled Law of the Eighth Circuit 11

II. The Eighth Circuit Court of Appeals Misinterpreted the Supreme Court's Decision in Steiner v. Mitchell in the Following Regards: (a) in Construing What the Supreme Court Said As a Matter of Pure Dicta Insofar As It Referred to Section 2 Portal Act Cases, As a Mandate for the Eighth Circuit to Change What Had Always Been Their Settled Law As to Section 2 Cases, and Even Though the Supreme Court Carefully Pointed Out That It Was Deciding Only a Section 4 Portal Act Matter 19

The Eighth Circuit Court of Appeals Misinterpreted the Supreme Court's Decision in Steiner v. Mitchell: (b) in Refusing to Follow As a Matter of Stare Decisis the Finding of the Supreme Court in the Steiner v. Mitchell Deci-

sion That Dressing and Showering Activities of the Nature Performed by the Battery Workers in the Steiner Case (a Fortiori Stronger and More Compelling Facts in This Case) Constitute Activities Which Were an Integral and Indispensable Part of the Employeers' Principal Activities 22

The Eighth Circuit Court of Appeals Misinterpreted the Supreme Court's Decision in Steiner v. Mitchell: (c) in Failing to Follow the Supreme Court's Correct Statement of the Law As to Section 2 Cases Even Though Dicta 23

III. This Decision Involves the Claims of Some 1,500 Employees for Compensation and Damages in the Neighborhood of Two Million Dollars. There Is at Least One Other Section 2 Case Now Pending Before the Eighth Circuit Involving the Employees of the Cities Service Defense Corporation, and Undoubtedly, There Are Other Section 2 Cases Still Pending in the Other Federal Circuits. Therefore, This Is a Matter Involving the Rights of Many People and for Substantial Sums of Money and It Is As Important That This Law As to Section 2 of the Portal Act Be Settled, Even As the Supreme Court Has Settled the Law As to Section 4. This Is True Particularly Where, As Now, the Courts Have Misinterpreted What the Supreme Court Meant Only to Apply to Section 4 Cases 24

Conclusion 25

Appendix A—

Opinion of District Court of Nebraska A1

Opinion of United States Court of Appeals, No. 15,-186 ..... A17

Opinion of United States Court of Appeals, No. 15,-187 ..... A26

Judgment of United States Court of Appeals A33
Order Denying Petition for Rehearing A34

Appendix B—

Statutory Provisions Involved—

Fair Labor Standards Act of 1938 ..... A35
Portal-to-Portal Act of 1947 ..... A37
Extract from the Fair Labor Standards Amendment of 1949 ..... A39

TABLE OF CASES

Biggs et al. v. *Joshua Hendy Corp.*, 183 F. 2d 515, June, 1950 (C. C. A. 9) 14, 16
Campbell et al. v. *Jones & Laughlin Steel Corp.*, 96 F. Supp. 189, Dist. Ct. of Pa. 17
Central Missouri Telephone Co. v. *Conwell*, 170 F. 2d 641 (C. C. A. 8) 12, 14, 16, 17, 19, 20
Dutton v. *Cities Service Defense Corp.*, 197 F. 2d 458 9
Glenn et al. v. *Southern Cal. Edison, Ltd.*, 187 F. 2d 318, Jan., 1951 (C. C. A. 9) 13
Joshua Hendy Corp. v. *Mills*, 169 F. 2d 898 (C. C. A. 9), Sept., 1948 ..... 13, 16, 17
Marchant v. *Sands Taylor & Wood Co.*, 75 Fed. Supp. 783, Dist. Ct. of Mass. 18
Martin-Nebraska Co. v. *Culkin*, 197 F. 2d 981 (C. C. A. 8) 12, 20
Michigan Window Cleaning Co. v. *Martino*, 173 F. 2d 466 (C. C. A. 6) 16, 17
Mitchell v. *King Packing Co.*, 216 F. 2d 618 (C. C. A. 9), 350 U. S. 260; 349 U. S. 914 ..... 6, 10, 11, 20, 22
Mount Clemens Pottery Case, 328 U. S. 680 13
Smith v. *Cleveland Pneumatic Tool Co.*, 173 F. 2d 755 (C. C. A. 6) 17
Steiner v. *Mitchell*, 215 F. 2d 171 (C. C. A. 6), affirmed 350 U. S. 247 ..... 6, 7, 10, 11, 20, 22, 23

F. W. Stock & Son v. *Thompson*, 194 F. 2d 493, Feb. 7, 1952 (C. C. A. 6) 15, 16
U. S. Steel Co. v. *Burkett*, Nov., 1951, 192 F. 2d 489 (C. C. A. 4) 16, 17

STATUTES CITED

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S C. 201, et seq.) 2, 3, 19, 21, 24, 25, A35
Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U. S. C. 251, et seq.) 2, 8, 9, 10, 11, 19, 21, 24, 25, A37

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OPINIONS BELOW.

The opinion of the District Court (App. A1-A16) is reported at 119 Fed. Supp. 793. The first opinion of the Court of Appeals (App. A17-A25) is reported at 228 F. 2d 929, and the opinion of the Court of Appeals on rehearing (App. A26-A32) is reported at 233 F. 2d 902.

JURISDICTION.

The judgment of the Court of Appeals on rehearing was entered on June 6, 1956. A timely petition for rehearing or for transfer to the Court *en banc* was denied on July 12, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTES INVOLVED.

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), and the Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U. S. C. 251, *et seq.*), are set forth in the Appendix, *infra*, A35-A40.

QUESTION PRESENTED.

Where powder line operators and inspectors in an ordnance plant must make extensive use of chemicals in melting, pouring and processing explosives for bombs and artillery shells and were prior to 1947 compelled by indispensable and vital considerations of health and plant safety measures against the hazards of the work, and required as a term of their employment to change from skin out into powder uniforms provided by the employer and to shower at the end of the work period to remove powder from hair and skin, are these clothes-changing and showering activities amounting to 45 minutes per day an integral part of their principal duties for which they are to recover compensation therefor, under the Fair Labor Standards Act, without meeting the requirements of the Portal-to-Portal Act by proving a special contract under which they

were to be compensated for these periods or a custom or practice under which compensation was to be paid therefor?

STATEMENT.

The facts of this case are actually and practically undisputed, and contained for the most part in findings of either the district court or a finding of the Circuit Court of Appeals for the Eighth Circuit in one of its two opinions. Reference (R. .....) refers to the typewritten record.

This action was instituted by the petitioners in 1945 against the Q. O. Ordnance Corporation of Grand Island, Nebraska, to recover compensation for overtime under the Fair Labor Standards Act of 1938, as amended. Commencing in March of 1942, the United States government erected an ammunition, shell loading and bomb loading plant on a tract of land known as the Q. O. Ordnance plant on the outskirts of Grand Island, Nebraska. The plant area, comprising twenty square miles, was at all times material to this action owned by the United States as were the plant buildings and the other equipment, tools and machinery used therein. On February 27, 1942, the United States entered into an agreement with respondent, the Q. O. Ordnance Corporation, a Delaware Corporation, relating to the operation of the plant and the manufacture, production, loading, shipping and handling of cartridges, shells and bombs. There were in all three main contracts, dated February 27, 1942, July 25, 1944, and October 5, 1944. The contracts were all performed by the Q. O. Ordnance Corporation during the periods covering all of the employment periods of the respective petitioners.

The finished products of respondent were shipped in interstate commerce to points outside the State of Nebraska.

Actual production, *i. e.*, pouring explosives into the shells, did not commence until November 11, 1942. However, materials used in production were shipped into Nebraska via interstate commerce and were received and stored at the plant prior to that date (App. A3).

The respondent in carrying out the contracts employed petitioners as powder line operators and production line inspectors. Powder line operators and inspectors are claiming overtime compensation for a forty-five minute period occurring every shift as a result of changing their powder uniforms at the beginning of the shift and removing the uniforms, taking a shower and dressing into street clothes after the termination of the shift. The powder line operators were engaged in loading bombs and shells. In all, there were four bomb and shell loading lines on the plant site. Each line was approximately one mile in length and consisted of many buildings connected by ramps. At the end of each line there was a building known as a change house. Each line was surrounded by a separate fence and the powder line operators gained access through the fence at the gate house where they were searched and relieved of all hazardous objects contained on their persons. From the gate house the line operators went to the change house (App. A11).

The change house was divided into two separate units, one for the men and one for the women. Each powder line worker would enter his respective unit, take off his clothes and put them in a locker provided for that purpose. He would then proceed to another room where he received and donned his powder clothes and respirator (R. 14, 21, 22, 27, 47). The powder clothes consisted of cotton underwear, denim coveralls with rubber buttons to prevent sparking, caps or bandana handkerchiefs, and safety shoes having no nails or metal in them (App. A12). All line

workers in fifteen of the eighteen buildings on each line were required to wear these powder clothes and respirator; it was mandatory (R. 37, 38). After donning the powder uniform the workers proceeded to their place on the line. These uniforms and respirators were worn by the powder line workers to protect the plant against sparks which would cause an explosion and also to protect the workers against a toxic powder contamination which was dangerous to the lungs and skin and would cause the hair to turn red. The plant had one bad explosion during operations by respondent in which ten or twelve workers were injured or killed (R. 18). It was also mandatory that powder line workers take a shower at the end of the shift to wash off the powder adhering to their skin and hair to further prevent powder contamination (App. A20). The time spent in changing to the powder clothes prior to shift time and removing them, taking a shower, and donning street clothes after the end of the shift, amounted to 45 minutes a shift and no compensation was ever paid the powder line workers for this time (R. 21, 22, 25, 27, 38; App. A19).

The line operators were paid for eight hours and there were three around the clock shifts.

In the early days of the operation the time clock was located at the gate house and the employees clocked in there. Later the time clock was kept inside the change house for a time, but was later moved to the ramp just outside the gate house on the side nearest the lines (App. A12). The result of this changing of the time clocks was that in the early part of the operation the clothes changing and showering activities were included in the "timed-in" period, and after removal of the time clocks to the ramp, the activities in question were not included within the "timed-in" period. The latest activities in question were performed in 1945.

On the trial of the case the trial court (hearing the case without a jury) dismissed the petitioners' complaints and amendments thereto.

All of petitioners' after trial motions having been overruled, petitioners effected an appeal to the Court of Appeals for the Eighth Circuit from the judgment dismissing the complaints and the amendments thereto. Thereafter, on August 10, 1954, the Sixth Circuit rendered its opinion in *Steiner* v. *Mitchell*, 215 F. 2d 171. Upon application based upon the *Steiner* v. *Mitchell* decision, *Supra*, petitioners were permitted by the District Court for the District of Nebraska, Grand Island Division, by order of September 24, 1954, to appeal *in forma pauperis* on typewritten record from the District Court, to dispense with reproduction of the exhibits in the record and to use the original exhibits on the appeal. Thereafter on April 29, 1955, the Court of Appeals for the Eighth Circuit affirmed the District Court and simultaneously therewith certiorari was granted by the Supreme Court of the United States in botn *Steiner* v. *Mitchell* and *Mitchell* v. *King Packing Company*, 349 U. S. 914. On the basis of certiorari having been granted in those cases, the Court of Appeals for the Eighth Circuit held its opinion in this case in abeyance until the decisions of the Supreme Court on January 30, 1956, whereby *Steiner* v. *Mitchell*, 350 U. S. 247, was affirmed, and *Mitchell* v. *King Packing Company*, 350 U. S. 260, was reversed. Thereafter, on February 10, 1956, the Court of Appeals for the Eighth Circuit granted rehearing and after rehearing on June 6, 1956, entered its order reaffirming the District Court and denying petitioners any recovery on their claims. Petitioners' motion for rehearing or to transfer to the Court *en banc* was denied July 12, 1956.

On July 27, 1956, the United States Court of Appeals for the Eighth Circuit entered its order staying the is-

suance of its mandate and granting petitioners until August 27, 1956, in which to prepare and file their petition for writ of certiorari to the Supreme Court of the United States. On August 27, 1956, and on September 25, 1956, the United States Court of Appeals for the Eighth Circuit entered its orders further staying the issuance of its mandate and extending the time to October 10, 1956, for petitioners to prepare and file their petition for writ of certiorari, provided that if within that time there is filed with the Clerk of the Court of Appeals for the Eighth Circuit a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay of mandate thereby granted shall continue until final disposition of the case by the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT.

1. This decision conflicts with the ruling decisions on the subject from the Ninth Circuit, the Sixth Circuit, the Fourth Circuit and decisions of district courts located in the Third Circuit and the First Circuit. In addition thereto, it conflicts with the heretofore settled law of the Eighth Circuit.

2. The Eighth Circuit Court of Appeals, misinterpreted the Supreme Court's decision in *Steiner* v. *Mitchell* in the following regards:

> (a) In construing what the Supreme Court said as a matter of pure dicta insofar as it referred to Section 2, Portal Act cases, as a mandate for the Eighth Circuit to change what had always been their settled law as to Section 2 cases, and even though the Supreme Court carefully pointed out that it was deciding only a Section 4 Portal Act matter.

(b) In refusing to follow as a matter of *stare decisis* the finding of the Supreme Court in the *Steiner* v. *Mitchell* decision that dressing and showering activities of the nature performed by the battery workers in the *Steiner case* (*a fortiori* stronger and more compelling facts in this case) constitute activities which were an integral and indispensable part of the employees' principal activities.

(c) In failing to follow the Supreme Court's correct statement of the law as to Section 2 cases even though dicta.

3. This decision involves the claims of some 1,500 employees for compensation and damages in the neighborhood of Two Million Dollars. There is at least one other Section 2 case now pending before the Eighth Circuit involving the employees of the Cities Service Defense Corporation, and undoubtedly there are other Section 2 cases still pending in the other Federal circuits. Therefore, this is a matter involving the rights of many people and for substantial sums of money and it is as important that this law as to Section 2 of the Portal Act be settled, even as the Supreme Court has settled the law as to Section 4. This is true particularly where, as now, the courts have misinterpreted what the Supreme Court meant only to apply to Section 4 cases.

ARGUMENT.

Introduction.

This is a case of first impression in this Court. It involves the claims of some fifteen hundred workers to approximately Two Million Dollars of unpaid overtime compensation and liquidated damages. A similar case is pending on the current docket of the Court of Appeals for the Eighth Circuit, *Dutton* v. *Cities Service Defense Corp.* (former opinion 197 F. 2d 458); others are doubtlessly pending elsewhere, although statistics are not available.

The case at bar concerns the time spent in dressing, undressing and showering at a bomb-loading plant prior to 1947. These activities were required by the employer and were absolutely essential to prevent the plant from exploding and to safeguard the workers' health. They were as integral and indispensable to petitioners' performance of their duties as any activity could be. The question is whether or not Congress intended by Section 2 of the Portal to Portal Act of 1947, c. 52, 61 Stat. 84 (29 U. S. C. 251 *et seq.*) to deny compensation for such activity.

The Court of Appeals for the Eighth Circuit has heard this case twice. It has written two conflicting opinions herein, both denying petitioners' claims. In the first opinion the court reaffirmed its previous decisions to the effect that in a pre-1947 situation it was not necessary under the Portal Act to find a custom, practice or contract to pay for the time in question if the activities involved were integral to the activity the worker was hired to perform. However, relying in part on the Ninth Circuit's decision in *Mitchell* v. *King Packing Co.*, 216 F. 2d 618, the Eighth Circuit held

that in the instant case the trial court had not erred in finding that petitioners' activities were not integral and indispensable to their principal activity.

Subsequently, this Court handed down its opinions in *Steiner* v. *Mitchell*, 350 U. S. 247, and *Mitchell* v. *King Packing Co.*, 350 U. S. 260. The latter case was reversed on the very grounds the Eighth Circuit had used it for authority in deciding this case. *Steiner* and *King*, as decided by this Court, made it abundantly clear that from a factual standpoint the activities of petitioners here must be classified as an integral part of the work they were hired to do.

Petitioners therefore sought a rehearing in the Eighth Circuit in this case. We pointed out that in *King* and *Steiner* this Court had before it factual situations less compelling than the factual situation here, and had ruled that they were integral parts of the principal activity. If the *Steiner* and *King* activities were integral and indispensable, we argued, the activities here could not be said to be otherwise. Therefore, under the Eighth Circuit's rule which obviated the need for proving contract, custom or practice in such cases, petitioners were entitled to compensation.

A rehearing was granted. The second opinion also concluded that petitioners were not entitled to recover. This time, however, the Court of Appeals did not, as they could not in the light of *Steiner* and *King*, hold that petitioners' activities in suit were not integral to the principal labor. Instead, the ruling simply was that Section 2 of the Portal Act precluded recovery. Thus, without saying so, the Eighth Circuit abandoned its previously settled rule that pre-1947 activities integral to the principal labor were compensable, regardless of contract, custom or practice. To the contrary, it appears to have held that Section 2 of the Portal Act denies compensation for any pre-1947 activ-

ity, principal or incidental, unless contract, custom or practice to compensate be shown. The remarkable thing is that the authority cited for this change of attitude by the Eighth Circuit is the Court's decisions in *Steiner* and *King*, granting compensation in post-1947 instances.

We submit that the Eighth Circuit has erred. Factually, *Steiner* and *King* rule this case, and require the conclusion that the activities here were integral to—that is, a part of—the principal activity. Legally Section 2 of the Portal Act does not deny compensability in such case. In holding otherwise, the Eighth Circuit's conclusion conflicts with decisions from other Circuits and misinterprets and misapplies the decisions of this Court in *Steiner* and *King*.

I.

This Decision Conflicts with the Ruling Decisions on the Subject from the Ninth Circuit, the Sixth Circuit, the Fourth Circuit and Decisions of District Courts Located in the Third Circuit and the First Circuit. In Addition Thereto, It Conflicts with the Heretofore Settled Law of the Eighth Circuit.

The particular conflict in the opinion sought to be reviewed and the prevailing opinions of other circuits is this:

On the second hearing herein, Judge Sanborn, speaking for the Court said:

> "Section 2 of the Portal to Portal Act was intended to preclude the allowing of claims such as those in suit based as they are upon clothes changing and showering activities which took place prior to May 14, 1947 and which were not compensable under any contract or practice * * *." (irrespective of whether or not said activities are an integral part of and indispensable to the employees' principal duties) (parentheses ours).

This is diametrically opposed to what Judge Collet had said in the prior opinion and which very well summarized the holdings of the conflicting opinions. He said:

> "The basic issue * * * is whether or not the clothes changing and showering activities were part of the principal activities which these workers were employed to perform.
>
> "We need not reiterate in detail that if, as plaintiffs contend, all of these periods of time constituted an integral part of their principal duties they are entitled to recover compensation therefor without meeting the requirements of the Portal to Portal Act by proving a special contract under which they were to be compensated for these periods or a custom or practice under which compensation was made therefor."

This last statement was the law in the Eighth Circuit at the time the case at bar was tried.

The authorities followed by petitioners, cited by Judge Collet for his statement and the first of which was the basis for all of the opinions in the conflicting circuits were:

Central Missouri Telephone Co. v. *Conwell,* 170 F. 2d 641;

Martin-Nebraska Co. v. *Culkin,* 197 F. 2d 981.

It will be noted in the following discussion of the conflicting cases that the different circuits state the rule in slightly varying fashion and with slightly different reasoning arrive at the same result. For instance, one court may say if the contract of employment *requires the activity,* then the exemption of Section 2 of the Portal Act is fulfilled; another says if the activity is integral the requirements of Section 2 need not be met; still another may bring the activity within a general definition of "work performed" or "the whole service rendered was of one and the same nature" or "actual duties performed" or "actual time

devoted by them to normal work" or "the regular normal part of the employment."

All seem to agree that what Section 2 of the Portal Act was aimed at eliminating were activities newly perceived by the *Mount Clemens Pottery Case*, 328 U. S. 680, and not activities falling within the above definitions.

In *Joshua Hendy Corp.* v *Mills*, 169 F. 2d 898 (C. C. A. 9), Sept., 1948, a shipyard engineer spent one-half hour per day on what was supposed to be a lunch period, but during which he continuously attended and watched the boilers, dials and instruments. He was furnished no relief man during this period and ate at a desk from which position he could watch the boiler and make timely adjustments. His services were performed between August, 1943, and March, 1945. From a judgment in favor of the plaintiff, the defendant appealed and among its defenses the defendant contended that it was relieved from liability for the claims arising under the Fair Labor Standards Act by reason of the application of Section 2 of the Portal to Portal Act. The court, l. c. 899, after pointing out that "an express provision of a non-written contract" sufficiently satisfied the Portal Act, held that the activities during the lunch period were "work performed" within the general definition of compensable time under his collective bargaining agreement. Had the rule of the opinion under attack been applied, an opposite result would have followed.

This rule was affirmed again by the *Ninth Circuit* in *Glenn et al.* v. *Southern Cal. Edison, Ltd.*, 187 F. 2d 318, Jan., 1951. This case involved activities of a pre-1947 nature and after the passage of the Portal to Portal Act, Section 2 of that Act was pleaded as a defense by the defendant. The plaintiff employees were sub-station operators and attendants, relief operators, hydro employees and pri-

mary servicemen for a public utility. The employees worked and lived in remote places on the property of the defendant. They were required to remain on the premises 24 hours of the work day. The relief operators were required to travel from station to station and stay overnight away from their homes. The primary servicemen worked on eight-hour shifts but at the termination of the shift they were required to remain in their homes or upon telephone call in order to be available for emergency calls. The plaintiff contended they were entitled to 24-hour pay and the defendant contended that active and inactive periods were separable and that the inactive services were not compensable. The defendant, filing motion for summary judgment, defended on the grounds of the Portal to Portal Act. The district court granted the motion on the theory that the Act deprived the court of jurisdiction. The *Ninth Circuit* Court of Appeals ruled that this was not a case for summary judgment because of the conflict of facts and in the course of its opinion said:

> "It is only upon findings of fact, after a regular adversary trial, as to just what the duties of the employees were and how they were to be compensated, that a conclusion can be drawn that there was or was not an express contract covering both so-called active and inactive service; or *that the whole service rendered was of one and the same nature.*" (Emphasis ours).

It will be noted from this decision, that the court was interested in whether or not the activities, as they put it "the whole service rendered was of one and the same nature." (Citing, among other authorities, *Central Mo. Tel. Co.* v. *Conwell*).

The *Ninth Circuit* again in *Biggs et al.* v. *Joshua Hendy Corp.*, 183 F. 2d 515, June, 1950, upheld the claims of workers for lunch periods during which the employees were re-

quired to work, and during the course of the opinion, l. c. 520, ruled that the activities in question comprised "the regular normal part of the employment." In addition, the *Ninth Circuit* referred to the activities as "the same kind of work as was performed throughout the remainder of the work week."

In *F. W. Stock & Son* v. *Thompson*, 194 F. 2d 493, Feb. 7, 1952, the *Sixth Circuit* Court of Appeals decided a case in which the plaintiffs were seeking recovery for unpaid overtime pursuant to the Fair Labor Standards Act for a period of time which was allotted to them for lunch and was supposedly a free period, but during which the plaintiffs' duties and responsibilities as employees were continual so that the time they spent on the employer's premises during said lunch period constituted work time. The defendant urged as a defense Sections 2 and 9 of the Portal to Portal Act. As recited by the court, l. c. 495, when the Fair Labor Standards Act of 1938 was passed:

> "An understanding was reached between appellant and its employees that, in order to continue the operation of the mill on a twenty-four-hour day basis with the same three shifts, there would be deducted from the time of the employees during the first year of the coverage of the Act a lunch period fixed at forty minutes. A compensatory increase was made in the hourly rate of pay to the employees, 'so that their take-home pay would not be reduced.' The actual starting and quitting time for the employees remained the same; and the forty-minute lunch period reduced the work week to the exact statutory maximum. In short, these employees were merely credited with a forty-four-hour week instead of the previously credited forty-eight-hour week, although they put in the same hours of work. The change was merely a bookkeeping transaction."

(This is substantially what occurred in the case at bar. The time records of the defendant originally included the dressing and showering activities in question within a gross period exceeding eight hours but for all of which employees were given eight hours pay. Later the time clocks were moved and the "timed-in" period thereby reduced to conform to the number of hours paid. This too was merely a bookkeeping change.)

After deciding other issues, the court, l. c. 499, notes 6 and 7, held that the time in question was not consumed in preliminary practices but that the lunch period activities were "actual duties performed during working hours." Following this, the *Sixth Circuit* cited with approval the rule of the *Eighth Circuit's Central Missouri Telephone Co.* case to effect that the Portal Act "was not intended to destroy claims of workers for actual time devoted * * * to normal work."

The *Sixth Circuit* also cited and followed *Biggs* v. *Joshua Hendy Corp., Ninth Circuit, supra; Joshua Hendy Corp.* v. *Mills, Ninth Circuit, supra;* and *Michigan Window Cleaning Co.* v. *Martino, Sixth Circuit,* 173 F. 2d 466, l. c. 469.

In *U. S. Steel Co.* v. *Burkett,* Nov., 1951, 192 F. 2d 489, the *Fourth Circuit* Court of Appeals held that where foremen and assistant foremen were requested to report at least 30 minutes ahead of the hour on which the shift started in order to confer with foremen and assistants shortly to go off duty as to the progress of work and problems to be encountered and the foremen and assistants were required to spend at least 10 minutes after the end of each shift for the purpose of passing out gate slips, such activities were compensable to the extent of 40 minutes per day and were not barred by Section 2 of the Portal to Portal Act. In so ruling the *Fourth Circuit* had this to say, l. c. 491:

"As was well said by Judge Rifkind in *Galvin* v. *National Biscuit Co.*, D. C., 82 F. Supp. 535, 537: 'Neither contract nor custom can open an avenue of escape from the obligations imposed by the Fair Labor Standards Act, 29 U. S. C. A., Par. 201, *et seq.* A contract may not validly dictate that eight hours work shall be calculated as seven hours.' "

The *Fourth Circuit* cited with approval *Joshua Hendy* v. *Mills, Ninth Circuit, supra; Smith* v. *Cleveland Pneumatic Tool Co., Sixth Circuit,* 173 F. 2d 755; *Michigan Window Cleaning Co.* v. *Martino, Sixth Circuit, supra,* and quoted at length from *Central Missouri Telephone Co.* v. *Conwell, Eighth Circuit, supra.* The decision in favor of the worker was based on the fact that his "work and labor performed was in the regular line of duty and under the regular contract of employment."

District Court cases from the circuits indicated hold precisely the same way. For instance, *Campbell et al.* v. *Jones & Laughlin Steel Corp.*, 96 F. Supp. 189, Dist. Ct. of Pa. (located within the *Third Circuit*) involved standby guard activity during a strike and concerning which the court said, l. c. 192:

"(1) It is the opinion of this court that these facts establish a non-written contract which expressly provided for the compensation of the guards on a twenty-four hour basis. It is established by the Captain's proposition agreed to by the committee and consummated by the substantial performance of the plaintiffs. The defendant acted upon it by paying plaintiffs 'around the clock' for two days. Therefore, plaintiffs' eating and sleeping time or off time in the plans of the defendant if regarded as an 'activity,' was compensible by an express provision of a contract within the meaning of Section 2 (a)(1) of the Portal to Portal Act. For this reason the first contention of the defendant for relief must be rejected."

(As heretofore pointed out, this is what substantially occurred in the case at bar. Originally under their employment agreement, all of petitioners' activities were lumped together including the particular activities in question. They worked under that agreement for several months until the time-clocks were moved. Thereafter they continued to perform exactly the same services and activities throughout each and every day. The employer's attempt to modify the agreement was as ineffective as the effort in the *Campbell* case.)

In *Marchant* v. *Sands Taylor & Wood Co.*, 75 Fed. Supp. 783, Dist. Ct. of Mass. (located within the *First Circuit*), it was held that the plaintiff's activities in checking lights, doors, windows and sprinkler system after other employees had left and checking the warehouse, firing the stoker and removing clinkers on Saturdays and Sundays was entitled to recovery of overtime "where *required under contract of his employment* and the employer was not relieved by Section 2 of the Portal to Portal Act." (l. c. 787).

(The petitioners, in the case at bar, as the *Eighth Circuit* found "were required to change their clothes and take a shower after the shift * * * were required to change their clothes as a safety precaution against explosion which might be caused from metallic objects on or in conventional clothing * * *. They were required to take a shower as a safety measure for the employee's own health to avoid after-effects of powder remaining on the person of the employee." (App. A20).

The conflict must now be evident. Had the rule of the opinion under attack been applied, there would have been no recovery in any of the above cases because there was no written contract or custom proven which specifically made compensable the precise activity under consideration.

The activities of the petitioners, on the other hand, were the specific subject of their non-written contract of employment, required by that employment agreement; the District Court and the Eighth Circuit Court of Appeals so found. So whether one says integral parts of an employee's principal duties are not eliminated by Section 2, or whether he says that proof that the contract of employment required that activity brings the activity within the "express provision of a non-written contract" exemption of Section 2, the result is the same. The activity is covered by the Fair Labor Standards Act and not affected by the Portal to Portal Act.

II.

The Eighth Circuit Court of Appeals Misinterpreted the Supreme Court's Decision in Steiner v. Mitchell in the Following Regards: (a) in Construing What the Supreme Court Said As a Matter of Pure Dicta Insofar As It Referred to Section 2 Portal Act Cases, As a Mandate for the Eighth Circuit to Change What Had Always Been Their Settled Law As to Section 2 Cases, and Even Though the Supreme Court Carefully Pointed Out That It Was Deciding Only a Section 4 Portal Act Matter.

A review of what has been said under the first section of this argument discloses that from 1948 (when the *Central Missouri Telephone* case was decided) to the date of the opinion under attack, June 6, 1956, the basic law as to Section 2 cases in the Eighth Circuit remained settled and unchanged. That rule was:

> "If the plaintiffs' activities constituted an integral part of their principal duties, they were entitled to recover compensation therefor without meeting the requirements of the Portal to Portal Act by proving a special contract * * * or a custom or practice * * *."

As a matter of fact, the *Central Missouri Telephone* case was the cornerstone decision for all of the circuits mentioned in Section 1 of this Argument. In addition, this Supreme Court had at least tacitly approved the rule, by denying certiorari (344 U. S. 866) and denying a rehearing of that denial (344 U. S. 888) both petitions aimed at the Eighth Circuit's reaffirmance of that rule in *Martin Nebr. Co. v. Culkin*, 197 F. 2d 981.

The Supreme Court as carefully as it could reminded those reading the *Steiner* and *King* decisions:

> "We are not therefore concerned with the provisions of Section 2, which is not applicable to actions relating to activities of the employees performed after May 14, 1947."

The Eighth Circuit did not overlook this warning because Judge Sanborn quoted that part of the *Steiner* opinion. However, he also quoted some dicta remarks the Supreme Court made in regard to Section 2 claims. In addition, he omitted any reference to either the Eighth Circuit's *Central Missouri Telephone* or the *Culkin* decisions (or for that matter any Section 2 decision), although they had been extensively argued.

It is safe to assume therefore that the instant opinion was predicated not upon authoritative cases but upon the dicta remarks in the *Steiner* case. We are certain that this court never intended that the *Steiner* opinion be thus misused.

It is probable that the Supreme Court might have rephrased some of their dicta remarks in a different manner had it actually been deciding a Section 2 case. As it was, Section 2 was not involved; there was no Section 2 advocate present presenting the pro and con considerations of such a case; and the matter had been brought before the court at

the solicitation of the Department of Labor confessedly interested primarily in the administration of the law under Section 4 of the Portal Act.[1]

We believe that if the same arguments had been made to this court in a Section 2 case that compelled the Eighth Circuit to render its early decisions as far back as 1948, this court would have drawn the line precisely where the Eighth Circuit, the Fourth, the Sixth, the Ninth, the First and the Third had always drawn it as between compensable and non-compensable activities of a pre-1947 nature.

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[1]In issuing its policy statements and interpretative bulletins concerning the effect of the Portal to Portal Act of 1947 on the Fair Labor Standards Act of 1938, the administrator of the wage and hour division made the following introductory statements:

> "Many of the provisions of the Portal Act do not apply to claims of liabilities arising out of activities engaged after the enactment of the act. These provisions are not discussed at length herein because the *primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act with which the administration of the wage and hour division is charged under law.*
>
> The discussion of the Portal Act in this part is, therefore, directed principally to those provisions that have to do with application of the Fair Labor Standards Act on or after May 14, 1947.
>
> (c) The correctness of the interpretation of the Portal Act, like the correctness of the interpretation of the Fair Labor Standards Act can be determined finally and authoritatively only by the courts."

The Eighth Circuit Court of Appeals Misinterpreted the Supreme Court's Decision in Steiner v. Mitchell: (b) in Refusing to Follow As a Matter of Stare Decisis the Finding of the Supreme Court in the Steiner v. Mitchell Decision That Dressing and Showering Activities of the Nature Performed by the Battery Workers in the Steiner Case (a Fortiori Stronger and More Compelling Facts in This Case) Constitute Activities Which Were an Integral and Indispensable Part of the Employees' Principal Activities.

Had the Eighth Circuit followed the finding of the Supreme Court in the *Steiner* v. *Mitchell* decision to the effect that the clothes changing and showering activities of battery workers, because of the hazards of the industry and the threat to the health of the employees, constituted an integral and indispensable part of the employee's principal activities and applied that finding to the set of facts in the case at bar, the Court could have done nothing else than to have followed their own settled law and rendered judgment in favor of the petitioners. The Eighth Circuit apparently felt that it was not compelled to follow the Supreme Court's finding on a comparable set of facts. As a matter of fact it said: "The Steiner and King Packing Company cases do not compel or justify a different decision * * *." That is what the *Ninth Circuit Court of Appeals* had said in the *King Packing Company* decision, and this Court reversed that case outright on its factual finding and on a much more questionable set of facts. However, Judge Collet had recited in his former opinion "The factual situation in *Steiner* v. *Mitchell* appears to be similar in many respects to the facts here." In addition to that statement, the *Eighth Circuit* had found that the employees "were required to change their clothes as a safety precaution against explosions which might be caused from sparks from the metallic objects on or in conventional clothing."

In this regard the case at bar factually was a much stronger case than the findings in the *Steiner* case. In the latter case there was no evidence that the battery acid might explode destroying the plant or killing or maiming the employees.

In view of the above, if the findings of Superior Courts on comparable facts have any significance, petitioners' activities would of necessity have to be ruled integral and indispensable to their principal duties.

The Eighth Circuit Court of Appeals Misinterpreted the Supreme Court's Decision in Steiner v. Mitchell: (c) in Failing to Follow the Supreme Court's Correct Statement of the Law As to Section 2 Cases Even Though Dicta.

Despite the absence of parties interested in Section 2, the Supreme Court in the *Steiner* decision made what we believe is a correct statement of the law when it said:

> "On the whole it is clear, we think, that while Congress intended to outlaw claims prior to 1947 for wages based on all employee activities unless provided for by contract or custom of the industry, including, of course, activities performed before or after regular hours of work, it did not intend to deprive employees of the benefits of the Fair Labor Standards Act where they are an integral part of and indispensable to their principal activities." (Pages 255-256 of 350 U. S.).

This is an accurate and sound statement of the law and it should be noted that Justice Warren was talking about pre-1947 cases when he made the statement. It can scarcely then be argued that his remarks related only to Section 4 cases. However, this statement, which is a correct statement of the law, was misinterpreted by the Eighth Circuit and the last phrase thereof deemed to refer only to Section 4 claims. This is an illogical conclusion which we cannot justify.

III.

This Decision Involves the Claims of Some 1,500 Employees for Compensation and Damages in the Neighborhood of Two Million Dollars. There Is at Least One Other Section 2 Case Now Pending Before the Eighth Circuit Involving the Employees of the Cities Service Defense Corporation, and Undoubtedly, There Are Other Section 2 Cases Still Pending in the Other Federal Circuits. Therefore, This Is a Matter Involving the Rights of Many People and for Substantial Sums of Money and It Is As Important That This Law As to Section 2 of the Portal Act Be Settled, Even As the Supreme Court Has Settled the Law As to Section 4. This Is True Particularly Where, As Now, the Courts Have Misinterpreted What the Supreme Court Meant Only to Apply to Section 4 Cases.

This section of the argument needs little elaboration. We have attempted to determine for the court exactly how many other cases are pending of a Section 2 nature, but, apparently, this information is not compiled. It would be impelling that this court review this matter if this case stood alone, for it is a large case involving many workers. It is more impelling that a very definite conflict now exists between this case and the opinions of more than half of the Circuit Court of Appeals. But, the fact that a decision of this court has been misinterpreted and misused for the purpose of upsetting basic and settled law made at a time when the question was of great national importance makes it practically mandatory that the court review and settle once and for all the law as to Section 2 claims under the Fair Labor Standards Act as affected by the Portal to Portal Act.

CONCLUSION.

Now that the court has clarified for the purpose of the Department of Labor the effect that Section 4 of the Portal to Portal Act had upon the Fair Labor Standards Act for the purpose of a smoother administration of the provisions of the Fair Labor Standards Act, it is just as important that the court clarify the law that relates to Section 2 of the Portal to Portal Act, and the many pending claims under the Fair Labor Standards Act. We are confident that if the court considers the precise problem at hand, after a full presentation by both sides they will agree with the prior conclusions of the Eighth Circuit and the Courts of the five other Circuits, and the law hereafter as to the effect of the Portal to Portal Act on both types of claims will be set at rest.

Petitioners respectfully request that this Court issue a Writ of Certiorari to the Court of Appeals for the Eighth Circuit to review this case.

Respectfully submitted,

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